vss

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4009 OF 1997

Tata Tea Limited (Bombay) Employees' Union ... Petitioner

V/s.

Tata Tea Limited & Anr. ... Respondents

Mr.C.U. Singh with Mr.Mahesh Londhe for Petitioner
Mr.J.P. Cama with G.S. Shetty and Ms.L.S. Das i/b Crawford Bayley & Co. for Respondent No.1

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **SEPTEMBER 19, 2007**

JUDGMENT:

. The award of the Industrial Tribunal in Reference (IT) No.156 of 1985 has been challenged in this petition. The Reference has been rejected by the Tribunal and the claim of the Petitioners that the clerical staff is entitled to pension has been negated by the Tribunal.

2. In 1948 the James Finlay & Co. (the predecessor of the Respondent Company) introduced a pension scheme for its clerical staff in India. The employees in all the branches of this company were granted benefits under the pension scheme and were informed by a circular dated 2.3.1948. The union representing the workers in the James Finlay & Co. raised demands in 1958 for the introduction of a gratuity scheme for all workers,

clerical as well as sub staff. As the James Finlay & Co. did not accede to the demand raised, the dispute was referred for adjudication on 15.1.1964. An award was passed by the Industrial Tribunal in Reference (IT) No.111 of 1963 known as the Bilgrami award. Demand No.8 pertained to gratuity while demand No.9 was with respect to pension for subordinate staff. The Tribunal while dealing with these demands has held that the demand for gratuity was unreasonable and, therefore, disallowed it as there was no evidence on record to show that such a practice of paying gratuity prevailed in any comparable concern. Part (b) of this demand for gratuity was that those employees who are entitled to pension in lieu of gratuity should have claimed gratuity instead of pension. The Tribunal held thus:

> 51. Part (b) of this demand is that those employees who are entitled to pension in lieu of gratuity should have the option to claim gratuity instead of pension. In this concern under the agreement pension is allowed to the clerical staff retiring from the company after 35 years' service, and the pension granted is quite liberal. The company will not by giving 15 months' basic wages be worse of, if gratuity is claimed in lieu of pension. I do not see why the company should resist this demand. This demand is granted. The company is directed to give gratuity in place of pension if any of the clerical staff entitled to pension on retirement claim gratuity in lieu of pension.

3. Thus, an option was given to the workers to claim gratuity as demanded by them in lieu of the pension. The Tribunal rejected the demand made for

retrospective effect for implementation of the gratuity scheme after it was amended in 1.6.1962.

4. As regards the demand for pension for subordinate staff, the Tribunal held thus:

> 54. Demand No.9 is for pension for the subordinate staff. This is a novel demand. In fact I have not come across any other company in which for the clerical staff pension is granted. This company has of its own free will granted pension under certain conditions to the clerical staff. I am not certain as to whether the pension in lieu of gratuity would be advantageous to the subordinate staff. If the company had not granted pension to the clerical staff, and there was a demand for them I would have hesitated to grant it. I cannot certainly grant this demand in the case of the subordinate staff. The demand is therefore rejected.

5. Thereafter, in 1965, the company introduced the pension scheme for subordinate staff voluntarily.

6. On 6.10.1972, James Finlay & Co. entered into a settlement with the union representing its workers in respect of several demands including a scheme for gratuity. The settlement stipulated that it was mutually agreed between the parties that all other service conditions which were not covered by the settlement would continue in accordance with the Bilgrami award dated 16.1.1964 and as amended by the agreement of 1.7.1965. All existing facilities were to continue unless specifically altered by the settlement of 6.10.1972. Under this settlement, the gratuity

scheme which was introduced was applicable only to those workmen who, being entitled to the benefits under the company's existing pension scheme, exercised their option for the gratuity scheme. The settlement also provided that if any employee was entitled to more gratuity under any applicable statute he would be paid gratuity in terms of that statute and not as per the scheme in the settlement. On 15.10.1975, a fresh settlement was signed between James Finlay & Co. and its employees in respect of general demands. Clause (i) of the settlement provided that the existing terms and conditions not altered by the settlement would remain unaffected by it.

7. Thereafter, Tata Tea Limited, Respondent No.1 herein, took over James Finlay & Co. The service conditions of the workmen remained unaltered even after Respondent No.1 took over the erstwhile James Finlay & Co. A settlement was signed between the Company and the Union i.e. Petitioner herein regarding their service conditions. Clause (k) of that settlement stipulated that the existing rights would not be altered unless specifically mentioned in the settlement.

8. A fresh settlement was then entered into between the Union and the company on 28.2.1983. This settlement also had a saving clause that the rights and obligations

and privileges conferred on the parties under the previous settlement, and awards would continue unless specifically altered by the settlement. It appears in 1983, when one of the members of the Union was due for retirement, by a letter dated 17.10.1983, the union called upon the company to pay pension in accordance with the existing pension scheme, that is, the scheme introduced by James Finlay & Co. in 1948. On the Company's refusal, the union raised an industrial dispute which was later referred for adjudication before the Industrial Tribunal. The dispute was registered as Reference (IT) No.156 of 1985. The dispute which was referred is as follows:

SCHEDULE

> "To determine the propriety, validity and legality of the Company's Circular dated 22nd May, 1974, intimating the unilateral withdrawal of the Pension Scheme from 9th May, 1974."

9. The Union justified its demand by filing its statement of claim wherein it was pleaded that the pension scheme which was unilaterally introduced by the Company in 1948 had crystalised into a privilege for the workers over the years. It was also contended that the unilateral withdrawal of the pension scheme by the company was an unfair labour practice since the provisions of section 9A of the Industrial Disputes Act had not been complied. The company filed its written

statement contending that it had informed the union by its letter dated 22.7.1983 that the clerical staff was not entitled to pension after the introduction of the Payment of Gratuity Act. It was further pleaded that the company had a right to withdraw the pension scheme as stipulated in the document granting the scheme. According to the company, it had not contravened any provision of law while unilaterally withdrawing the pension scheme as there was no need for two retiral benefits.

10. The union examined two witnesses in support of its contentions. Significantly, the company did not lead any evidence in rebuttal. The Tribunal by its award, rejected the demand of Union and dismissed the Reference. The Tribunal held that the document of 1948 was an agreement between parties and, therefore, proviso to section 9A was attracted. The change which was effected by the company was also pursuant to that settlement which did not necessitate the issuance of a notice u/s 9A. The Tribunal also held that with the introduction of the Payment of Gratuity Act in September 1972, the employees had a right to either gratuity or pension and not to both. They were expected to exercise their option under several settlements which were signed between the company and the union. While rejecting the demand, the Tribunal was of the view that withdrawal of

the pension did not attract the provisions of entry 2 or 8 of the fourth schedule of the Industrial Disputes Act, 1947.

11. Mr.Singh, appearing for the Union, submitted that payment of pension had become a condition of service of the employees working with the company since it had been paying that benefit from 1948 onwards. Assuming it was unilaterally paid by the company initially, it had crystalised into a condition of service as it was a customary benefit and a privilege which the workmen enjoyed since 1948. He submits that the document granting pension i.e. the circular dated 2.3.1948 was not a settlement or an award as held by the Tribunal and, therefore, the proviso to section 9A of the Industrial Disputes Act was not attracted. He points out that a notice of change ought to have been issued u/s 9A, prior to withdrawal of the benefit of pension. He then submits that the Tribunal has not answered the terms of Reference which required the Tribunal to determine the propriety, validity and legality of the company's circular dated 22.5.1974, unilaterally withdrawing the pension scheme from 9.5.1974. He submits that the Tribunal has not considered the propriety of the action taken by the company and, therefore, has not answered the terms of the Reference. The learned Counsel also points out that

the Bilgrami award, parts of which according to him were engrafted into the settlement of 6.10.1972, recognised that a pension scheme was in force. The Bilgrami award also notes that pension was being paid by the Company "of its own free will", under certain conditions, to the clerical staff. He submits therefore that this voluntary implementation of the pension scheme had become a condition of service of the employees over the years. The learned Counsel points out that the Company was paying pension to workers employed in places other than Mumbai even after the introduction of the Payment of Gratuity Act. He then points out that the pension scheme was extended by way of a settlement between the Company and the Union in 1965 to the subordinate staff. The Company therefore, had rightly issued a notice of change u/s 9A to the subordinate staff before withdrawing the pension scheme in 1974. However, in the case of clerical staff, neither the workmen nor the union were informed that the pension scheme was being withdrawn or had been withdrawn w.e.f. 22.5.1974. He urges that the award of the Tribunal be set aside and it be held that there was no propriety in withdrawal of the scheme nor was the withdrawal legal as the provisions of section 9A had not been complied prior to withdrawal of the scheme.

12. Mr.Singh has relied on several judgments. The

Supreme Court in the case of *Mcleod & Co. Ltd. v/s. The Workmen*, **AIR 1964 SC 1449**, has held that the history of the relations between the parties coupled with the prevailing practice in the comparable concerns in the region supported the view taken by the Tribunal that payment of cash allowance for tiffin had become an implied condition of service. This payment was an amenity to which the employees were entitled besides wages and DA. Thus, it was held that although an award of the Tribunal directed payment of cash allowance in lieu of tiffin arrangement, the workers were entitled to this allowance as it had become a condition of service. He also places reliance on the judgment of the Supreme Court in the case of *Bareilly Holdings Ltd. v/s Their Workmen*, **(1979) 3 SCC 257.** The Supreme Court in this judgment has taken the view that benefits provided under the Employees State Insurance Act cannot be used by an employer as an excuse or justification for refusing or discontinuing those benefits which are available to the workmen under their conditions of service. The benefits cannot be reduced merely on account of similarity between the benefits available under the ESI Act and the existing benefits. The fcilities and benefits under the ESI Act are not intended as substitutes for benefits to which the workmen are entitled as conditions of service. This judgment has been followed by the Supreme Court in *Calcutta Electric Supply Corporation Limited vs.*

Calcutta Electric Supply Workers' Union & Ors., **(1994) 6 SCC 548.** The Supreme Court observed that the ESI Act does not permit tampering with the service conditions in existence on account of the operation of the Act. It has been held that the benefits which have become a part of service are not intended to be affected by the provisions of the ESI Act and the scheme except to the extent stipulated thereunder. These judgments have been cited by the learned Counsel in order to buttress his submission that the payment of pension udner the 1948 document had become a condition of service which could not be unilaterally withdrawn merely because the Payment of Gratuity Act came into force in 1972.

13. Mr.Cama learned Counsel appearing for the Company on the other hand, submits that there has been an inordinate delay on the part of the union in approaching the Tribunal for adjudication of their claim that the withdrawal of the pension scheme was illegal. He submits that while the pension scheme was withdrawn by a letter of 22.5.1974, the union has obtained a Reference only in 1985. The learned Counsel then submits that four people had retired between 1974 and 1983 and no pension was paid to them; the union had not approached the management for implementation of the pension scheme, which was withdrawn on 22.5.1974. He submits that the cause of action has arisen in 1974,

immediately after the pension scheme was withdrawn by the management and therefore, a reference made after 11 years was rightly rejected by the Tribunal. According to the learned Counsel, the witnesses of the union have admitted that they were aware about the circular dated 22.5.1974, withdrawing the pensionary benefits. He submits that the pleadings are inconsistent with the evidence on record and in fact there was acquiescence on the part of the workman in respect of the letter withdrawing the pensionary benefits. He submits that the document dated 2.3.1948 must be read in its totality since the right to pension flows from that document. According to the learned Counsel, the company had reserved its right, by this document itself, to withdraw the pension scheme in the event some other benefits like gratuity were made available to the workman. He submits that the document dated 2.3.1948 was a settlement between the parties and by that settlement, the union had agreed to allow the management to withdraw the benefit of pension, unilaterally. The learned Counsel buttresses this submission by relying on the judgments in *Herbertsons Ltd. v/s. The Workmen of Herbertsons Ltd. & Ors.*, **(1976) 4 SCC 736** and *Haryana State Coop. Land Development Bank v/s. Neelam,* **(2005) 5 SCC 91** and *Nedungadi Bank Ltd. v/s. K.P. Madhavankutty*, **(2000) 2 SCC 455** The learned Counsel then points out that every settlement between the Company and the union, right from

the settlement of 6.10.1972 recognises that there was only one benefit available to the workman and that was gratuity. He points out that the Bilgrami award had clearly refused the workers both benefits i.e. pension and gratuity. The workmen were expected to exercise their option for either benefit. This was adopted in the settlement of 6.10.1972 and the subsequent settlements between the company and the union. The learned Counsel then submits that a notice of change u/s 9A is not required to be issued since the document of 1948 is a settlement or at any rate an agreement, which contained a clause for withdrawal of the benefit and, therefore, no notice u/s 9A was required. He submits that the proviso to section 9A must be interpreted purposively and the word "agreement" should be read into the proviso. Any bilateral document would attract the proviso to section 9A. The document of 1948 is a bilateral document, allowing the company the right to withdraw the benefit, unilaterally and therefore, the proviso to section 9A would be attracted. The condition of withdrawal under certain circumstances was therefore bilaterally agreed. He further submits that the word agreement must be interpreted *ejusdem generis* with the term "settlement" contained in the proviso to section 9A. Mr.Cama also submits that the terms of reference in this case indicate that the union was aware of the circular dated 22.5.1974 and the schedule of the

reference throws light on this fact. He submits that since the schedule mentioned the circular dated 22.5.1974 the Tribunal could not traverse beyond the reference. He relies on the judgments in *Pottery Mazdoor Panchayat v/s. Perfect Pottery Co. Ltd & Anr.*, **(1979) 3 SCC 762;** *Managing Director, Karnataka Handloom Devl.Corpon. Ltd. v/s. Sri.Mahadeva Laxman Raval*, **2007 I CLR 25;** and *Avas Vikas Sansthan & Anr. v/s. Avas Vikas Sansthan Engineers Assn. & Ors.,* **2006 II CLR (SC) 1** for this proposition. The learned Counsel places reliance on the judgment in the case of *Surya Dev Rai v/s. Ram Chander Rai & Ors.,* **(2003) 6 SCC 675** to submit that the supervisory jurisdiction of this Court is not available to correct mere errors of fact or law unless the error is manifest and apparent on the face of the proceedings or a grave injustice or gross failure of justice has been occasioned.

14. The submission of the learned Counsel for the company that the circular of 1948 is a settlement or an agreement must be examined first. The document of 2.3.1948 reads thus:

"TO ALL MEMBERS OF THE INDIAN CLERICAL STAFF
PENSIONS

. The Directors have agreed that, with effect from 1st January 1948, pensions on the following scale will be paid to the employees retiring with the consent of

the Company after 35 years' service -

. 50% of salary drawn in last year of service less whatever sum of the Company' contribution to the Provident Fund in respect of the employees and his share of the Capital Reserve Account will yield when invested at 4%. For example -

Assume 50% is Rs.100/- and the Company's contributions and share of Capital Reserve Account in Provident Fund payable to retiring employee is Rs.3,000/-. The maximum pension payable will be Rs.100/- less Rs.10/- (being interest of 4% p.a. on Rs.3,000/- or Rs.90/- per month.

. For retirement with the consent of the Company before 35 years' service but ot before 30 years' service proportionate pension will be paid as follows-

34 years	-	47% of salary less Provident Fund adjustment as above.
33 years	-	-do-
32 years	-	-do-
31 years	-	-do-
30 years	-	-do-

. Retirements under 30 years' service to be considered on their merits and will receive the sympathetic consideration they have received in the past. The same applies to assistance to widows and dependants in the event of the premature decease of the employee. No fixed rules regarding these will be laid down.

. So long as a dearness allowance remains in force, a retiral dearness allowance equal to 50% of the minimum dearness allowance payable from time to time to employees will be paid to retiring employees eligible for pensions.

. It must be clearly understood that the above scheme is entirely discretionary on the part of the Directors and that they are at liberty to withdraw it at any; time and particularly if the Legislature or any award made under any legislation places the Company the Company in a position where the Company is bound to pay any pension, gratuity or retiral or superannuation allowance.

For Pro JAMES FINLAY & CO., LIMITED
Sd/- Charles Forgan Morris.

Bombay, 2nd March, 1948."

15. According to the learned Counsel, the words "the Directors have agreed" indicate that the Directors had agreed with the workers that from 1.1.1948, pension would be paid to the retiring employees with the consent of the company on certain terms and conditions.

16. In my opinion, this submission is unsustainable. The document is signed by the company. There is no stipulation in this document as to who the Directors had agreed with to pay pension or whether the Directors had agreed amongst themselves to pay pension. It would be a complete misreading of the document to interpret it to mean as suggested, that the Directors had agreed with the union when there is no other corroborative evidence on record. There is no material at all record to establish that the pensionary benefits payable under this document were extended to the workers due to an agreement arrived at between the union and the Directors of the company. Therefore, the aforesaid words will have to be construed in the context that they appear, that the Directors had agreed amongst themselves that pensionary benefits should be paid to retiring employees. The document of 1948 can by no stretch of imagination be construed as a settlement or an agreement, but is a charter for payment of pension. Furthermore, the last paragraph of the document

indicates that the scheme was being extended at the discretion of the directors. There would be no room for such discretion if it was a bilateral document.

17. The last paragraph of this document also stipulates that the company may withdraw the pensionary benefits at any time, particularly if by legislation or by an award the company has to pay pension, gratuity or retiral or superannuation allowances. The question therefore is whether such a condition could be acted upon by the company after extending the benefits of pension for more that 24 years, assuming that the workmen were aware of the withdrawal of the benefit in 1974 itself. In my view, when a benefit has been given to the workmen for such a long period of time it was not open for the management to withdraw it unilaterally without issuing a notice u/s 9A of the Industrial Disputes Act. The settlement of 6.10.1972 charts out a scheme for payment of gratuity and stipulates in note 4 as follows:

> (4) Gratuity shall not be payable to any workman who being entitled to the benefits under the provisions of the Company’s existing pension scheme exercises his option thereto."

18. Clause 3 of the settlement formulated the claim of gratuity. Note 6 reads as follows:

> (6) If any employee is entitled to more gratuity under any applicable statute, he shall be paid gratuity in terms of such statute and not as per the above scheme.

19. Clause 5 of the settlement was a saving clause under which it was mutually agreed that all service conditions laid down in the Bilgrami award would continue unless altered by the settlement. Thus, gratuity was not to be paid to any workman under the scheme formulated in the settlement, unless, he exercised his option for the same instead of continuing with the pension scheme. It cannot be forgotten that this scheme was introduced after the enactment of the Payment of Gratuity Act in September 1972. Note 6 therefore provided that the employees would be entitled to the gratuity payable under the statute if the terms were more beneficial than the scheme. The Bilgrami award recognises the fact that the pensionary benefits were being paid to the clerical staff, voluntarily, by the company. An employer is bound to pay gratuity to the workers after the enactment of the Payment of Gratuity Act. It is not open for an employer to contend that the workmen would entitled to either gratuity or pension after the Act has come into force. The payment of gratuity is a condition of service recognised under the Payment of Gratuity Act. If any workman had exercised his option under the settlement of 6.10.1972 and requested that he be paid gratuity the company would

have been bound to pay gratuity under the scheme in the settlement. After the Payment of Gratuity Act came into force the Company was bound to implement its provisions even for those who had not exercised their option for receiving gratuity as a retiral benefit instead of pension. The company ought to have paid gratuity as well as pension to all employees who retired from service since none of them had exercised their option for payment of gratuity. That being the position, it was not open for the company to withdraw unilaterally the pensionary benefits merely because the Payment of Gratuity Act came into force. The workers had enjoyed the benefits of receiving pension from 1948 onwards. This benefit which initially was unilaterally extended by the company to the workers had metamorphosed into a privilege with the passage of time and the workers are entitled to receive pension as a matter of right. The privilege was a condition of service to which each workman was entitled on his retirement.

20. Section 9A of the Industrial Disputes Act reads as follows:

> "9-A. Notice of change. - No employer, who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule, shall effect such change, -
>
> (a) without giving to the workmen likely to be

> affected by such change a notice in the prescribed manner of the nature of the change proposed to be effected; or
>
> (b) within twenty-one days of giving such notice:
>
> Provided that no notice shall be required to effecting any such change -
>
> (a) where the change is effected in pursuance of any settlement or award; or
>
> (b) where the workmen likely to be affected by the change are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Services (Temporary Service) Rules, Revised Leave Rules, Civil Service Regulations, Civilians in Defence Services (Classification, Control and Appeal) Rules or the Indian Railway Establishment Code or any other rules or regulations that may be notified in this behalf by the appropriate Government in the Official Gazette, apply.

21. The provisions of section 9A are attracted when any change is to be brought about in the conditions of service enlisted in Fourth Schedule of the Industrial Disputes Act. Entry 2 reads as follows:

> "2. Contribution paid, or payable, by the employer to any provident fund or pension fund or for the benefit of the workmen under any law for the time being in force;"

22. Although pension was not paid under any law to the workman, it was being paid on a voluntary basis by the company. While considering whether entry 2 is violated, the Tribunal has held thus:

> "11. ... If we go through the entry No.2 wherein opening word is used by the legislature as "contribution paid or payable". Here in the disputed circular entire pension was agreed by the company. There was no contribution fixed between the parties and therefore to my mind this entry will not help to the contention of the second party union. ....."

This reasoning of the Tribunal is unsustainable. The entire pension which was being paid to the workers was on the basis of the payment made unilaterally and voluntarily by the company. Therefore any change which falls within the ambit of Entry 2 can be brought about only after a notice of change u/s 9A is issued.

23. Entry 8 reads as follows:

> "8. Withdrawal of any customary concession or privilege or change in usage".

24. I have already come to the conclusion that the pension scheme was a privilege that the workers enjoyed since 1948 and that withdrawal of that privilege was a change which contemplated the compliance of the provisions of section 9A.

25. The submission of the learned Counsel for the respondent that the term "agreement" should be read into the proviso to section 9A cannot be accepted. The Industrial Disputes Act recognises only the term "settlement" which is defined in section 2(p) of the ID Act. The term "agreement" has not been defined. The

term "agreement" cannot be read into this proviso as the term "settlement" has a different connotation under the ID Act. Every agreement signed between the parties need not be a ‘settlement’. The legislature has, therefore, with some purpose excluded the word "agreement" from the proviso. To read into the proviso the word "agreement" would be doing violence to the proviso. The term, "settlement" and "award" have been defined under the ID Act and when any change is to be effected in pursuance of a settlement or an award as defined under the Act, no notice of change is required u/s 9A. The document of 1948 is neither a settlement nor an agreement. This is a charter of the Company, unilaterally extending pensionary benefits to the workmen. Although the document reserves the right to the company to withdraw the pensionary benefits at its discretion, this right cannot be exercised without following the provisions of law, namely, issuance of a notice u/s 9A of the ID Act. In my opinion, therefore, the submission of the learned Counsel for the Respondent that no notice of change u/s 9A was required to be given before withdrawing the pensionary benefit is without merit and must be rejected.

26. The question of delay in approaching the Court has been raised by the learned Counsel for the respondent. He submitted that the workman had

acquiesced in the withdrawal of the pension scheme as they had taken no steps after receipt of the letter dated 22.5.1974. According to him, the witness for the union has admitted that the union had not objected to the terms and conditions of the circular or document of 2.3.1948 extending the pensionary benefits. The learned counsel for the Company brings to my notice two admissions of the union's witness: that "It is true that the benefits under the circular dated 2.3.1948 were not given to many employees after 22.5.1974". The other admission is that after withdrawal of the scheme pursuant to the circular dated 22.5.1974, pension was not paid to any retired employee. According to Mr.Cama, these are admissions made by the witness indicating that he and the union were aware of the withdrawal of the benefits in 1974. However, this interpretation placed by Mr.Cama on the aforesaid "admissions" is a misreading of the evidence. The witness has in fact stated in his examination in chief that 4 employees from the Bombay Office had received pensionary benefits upto 26.5.1984. The witness has stated that the union and its members became aware that the company had decided not to pay pensionary benefits was in the year 1983 for the first time when P.S. Manian was refused pensionary benefits. The demand was raised immediately by the union by its letters dated 16.7.1983 and 2.8.1983. There is no evidence at all on record to indicate that the union or

its members had in fact received the circular of 22.5.1974. Significantly, the company has chosen not to lead any evidence in the matter to prove that the union was aware of the withdrawal of the benefits in 1974 itself. Therefore, the submission made by the learned Counsel for the respondents on the ground of delay are unsustainable.

27. Mr.Cama then submits that the payment of pension was a contractual grant which gave a right to the company to withdraw the pension. The withdrawal is in fact an enforcement and/or implementation of the service conditions and therefore, the dispute which is referred for adjudication is not an industrial dispute submits the learned counsel. He relies on the judgment in the case of *Managing Director, Karnataka Handloom (supra)*, in support of this argument. The learned Counsel for the Company then submits that the grant of pension was not a customary concession but a contractual grant and therefore the provisions of section 9A will not be attracted. The Supreme Court in the aforesaid case was concerned with the challenge to the award of the Labour Court granting relief of reinstatement in favour of a workman who was employed on a contract basis. The Supreme Court has observed that the evidence on record indicated that the claimant was aware that his appointment was purely contractual and for a specified

period and that he was not eligible to any other benefits as a regular employee of the corporation. It was therefore held that he was liable to be terminated from service without any notice and without payment of compensation and that his appointment stood automatically terminated on completion of the stipulated period. Therefore, the case of the claimant was not an industrial dispute. In my view, the analogy sought to be drawn by the learned Counsel is without merit. As stated earlier, the document of 1948 which originally was a voluntary benefit granted to the workers by the company had crystalised into a privilege with the passage of time. The clause for withdrawal cannot operate to the disadvantage of the workers when the pensionary benefit has become a privilege over the years. Withdrawal of such a privilege without a notice of change is certainly an industrial dispute.

28. The learned Counsel has also relied on the judgment in the case of *Avas Vikas Sanstha (supra)* to submit that the workmen are estopped from resiling from the document of 1948 as the offer made by that document was conditional. The judgment relied on by the learned Counsel is in respect of abolition of posts and the right to reemployment. The Supreme Court observed that the workers had accepted the alternative employment on the terms and conditions of the local bodies and had

filed a solemn statement by way of an affidavit that they would not claim continuity of service for protection of seniority etc. They had also sworn not to challenge the terms of such employment and to withdraw the writ petition filed by them. It was in these circumstances that the Supreme Court held that the workers were estopped from claiming the benefits and challenging the terms and conditions of fresh employment. This judgment does not have any application to the facts in the present case. The submission that the document of 1948 was a conditional offer to the workmen for payment of pension, is itself, incorrect. The document of 1948 is not an offer. It is a circular conveying the decision of the Directors of the company to the workmen that they would be paid pension w.e.f. 1.1.1948 on certain conditions being fulfilled and at the rates stipulated in the circular of 1948. Therefore the submission of the learned counsel is without merit.

29. Mr.Cama then submits that when gratuity is mandatorily payable to the workmen, there is no question of exercising the option for pension. Thus pension is not payable at all according to the learned counsel. This submission also cannot be accepted. The Bilgrami award and the settlement of 6.10.1972 and the subsequent settlements of 15.10.1975, 23.12.1980 and 28.2.1983 make it clear that it is only when employees exercise the

option for payment of gratuity that pension need not be paid to them. There is no evidence on record at all to show that any of the employees had exercised their option for payment of gratuity alone. Therefore, they continued to be entitled to pension. The introduction of the Payment of Gratuity Act would not in any manner fetter their right to be paid pension under the document of 1948. The gratuity payable under the scheme formulated in the settlement of 6.10.1972 gave way to the Payment of Gratuity Act and therefore, the employees would be entitled to both benefits. As held by the Supreme Court in the case of *Bareilly Holdings Ltd. v/s. Their Workmen (supra)* and *Calcutta Electric Supply Corporation Ltd. (supra)*, a benefit which is payable statutorily does not substitute the benefits payable as conditions of service. Significantly, it must be noted that only those employees of Respondent No.1 who are working in Mumbai are not being paid both the benefits. The workmen in Kolkata are being paid gratuity as per the Payment of Gratuity Act and pension under the 1948 document. The unilateral grant of pension has fructified into a privilege over a period of 24 years which cannot be withdrawn by the stroke of a pen. The mandatory requirement of a notice of change u/s 9A ought to have been followed as the company was withdrawing the privilege which is a pensionary benefit.

30. In the result, Petition allowed. The impugned order is set aside. Rule made absolute accordingly. No costs.

31. On the application made by the learned advocate for the Respondent No.1, the order is stayed for a period of four weeks.